No. 48609-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Morris Keith,

Appellant.

Lewis County Superior Court Cause No. 15-1-00285-1

The Honorable Judge Richard Brosey

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The court violated Mr. Keith's Sixth and Fourteenth Amendment right to present a defense.
2. The court violated Mr. Keith's right to present a defense under Wash. Const. art. I, §§ 3 and 22.
3. The court violated Mr. Keith's right to present a defense by refusing to instruct on self-defense.

> **ISSUE 1:** Did the trial court violate Mr. Keith's constitutional right to present a defense by refusing to instruct the jury on self-defense where the evidence included some evidence that Mr. Keith acted in self-defense?

4. The court violated Mr. Keith's right to present a defense by excluding critical evidence that was relevant and admissible.
5. The court violated Mr. Keith's right to present a defense by excluding evidence of Moon's prior assault conviction, of which Mr. Keith was aware at the time he used force in self-defense.

> **ISSUE 2:** Did the trial court violate Mr. Keith's constitutional right to present a defense by excluding evidence of Moon's prior conviction for assault where Mr. Keith was aware of that conviction and was claiming he acted in self-defense?

6. The trial court erred by requiring Mr. Keith as part of his sentence to undergo a drug and alcohol evaluation and follow treatment recommendations.

> **ISSUE 3:** Did the trial court err by ordering Mr. Keith to undergo drug and alcohol evaluation, where the judge "[didn't] think there was any particular evidence" of alcohol or drug involvement?

3. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

> **ISSUE 4:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Morris Keith is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In 2009, Morris Keith moved to his current residence in Centralia. RP 236-237. Sometime later, Justin Moon moved into a home across the street and three houses down from Mr. Keith. RP 236- 237.

Moon was not a good neighbor. RP 178. It was common for Moon to get drunk and play music in his garage with the door open, especially rap music, loud enough to bother all the neighbors around him, including Mr. Keith. RP 73, 88, 102-103, 156, 238.

Moon's loud music was a neighborhood problem for years. RP 156. Moon's girlfriend, Kimberly Brooks, was also bothered by how loudly Moon listened to his music. RP 103.

Neighbors have talked to Moon about turning the music down many times. RP 167. Mr. Keith spoke to Moon six times between 2014 and 2015 about Moon playing his music too loud. RP 114, 239. Moon would argue about the music, then turn it down, then drink a little more and turn it back up. RP 239. There were never any threats or altercations, but Moon would tell Mr. Keith that Moon could do whatever he wanted, as he wanted, whenever he wanted. RP 240.

Mr. Keith had called the police about Moon's listening to his music loudly. RP 240. Moon has been ticketed several times by police for the music. RP 73, 88, 103.

On May 31, 2015, Mr. Keith attended the funeral of a friend's mother. RP 241-242. Around 7 pm that evening, Moon began playing rap music loudly in his garage. RP 244. Mr. Keith's house gets "hammered" by the music from Moon's garage. RP 166. On this day, the music was loud enough for objects on the walls of Mr. Keith's home to rattle. RP 244. The music continued until 9:30 or 10 when Mr. Keith went to Moon's house intending to return a hammer and to ask Moon to turn the music down. RP 244-246.

Mr. Keith confronted Moon about the music, but the nature of that confrontation is disputed. What is undisputed is that Moon's nose was broken when it was hit by the hammer, and Mr. Keith was arrested for assault.

At trial, Mr. Keith testified that he contacted Moon, turned the music down, put the hammer on a bench in the garage, then spoke to Moon about the music. RP 245-247. Mr. Keith testified that he asked Moon to keep the music volume low and Moon responded, "I could listen to whatever I want, whenever I want, and how I want." He said that when Mr. Keith tried to leav,e Moon grabbed the hammer and swung it at Mr.

Keith's prosthetic leg, damaging it and also hitting Mr. Keith's other leg. RP 247-249, 265.

According to Mr. Keith, Moon swung the hammer a second time but Mr. Keith was able to block the hammer and grab it. The two then engaged in a give-and-take struggle over the hammer. RP 251. Mr. Keith testified that he was trying to protect himself and never had control over the hammer until he walked out of the building. RP 267. Mr. Keith testified that Moon was hit in the face with the hammer.[1] RP 268. Mr. Keith testified that the hammer was thrown at him as he left the garage. RP 270.

Moon and his girlfriend testified that Mr. Keith struck Moon in the groin and face with the hammer. RP 74-77, 105-108. Brooks claimed that Mr. Keith then exited the garage and gave the hammer to his wife, who had arrived during the altercation. RP 110-111. Brooks called the police, who arrested Mr. Keith. RP 83, 113-115. Moon claimed that he did not own a hammer and denied throwing the hammer at Mr. Keith. RP 94.

Paramedics took Moon to Centralia Providence Hospital where he was examined. RP 83. Moon had multiple serious nasal fractures but no signs of trauma to his groin area. RP 206, 211-212.

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[1] He denied that Moon was struck in the groin with the hammer, and Moon had no injuries in that area. RP 206, 211-212.

The state charged Mr. Keith with second degree assault while armed with a deadly weapon, burglary in the first degree while the victim was present, and felony harassment.[2] CP 1-3.

Pretrial, Mr. Keith indicated that he would be asserting self-defense. RP 42. The state moved to exclude evidence of Moon's prior convictions for assault.[3] RP 40-48; CP 19. Mr. Keith indicated that he was aware that Moon had been convicted for assaulting someone with a rock. RP 41.

The trial found that Moon's prior assault conviction was irrelevant unless Mr. Keith testified that he assaulted Moon and that he assaulted Moon because of Moon's prior assaultive behavior.[4] RP 46.

The state also moved to exclude evidence that Moon's blood alcohol content was 0.322. CP 19. Mr. Keith argued that the state planned to call the doctor that treated Moon, and the doctor could discuss Moon's level of intoxication. RP 48-49. The trial court interrupted defense counsel's argument and excluded evidence of the blood alcohol

[2] The jury acquitted Mr. Keith of the burglary and harassment charges.

[3] The state also sought to exclude Moon's prior drug convictions. RP 40-48.

[4] The trial judge reserved ruling on the motion to exclude evidence of Moon's prior assault, but indicated that his inclination was to keep the evidence out. RP 47.

content unless Mr. Keith presented expert testimony on the subject. RP 48-49.[5]

At trial, Mr. Keith testified that Moon was injured during an altercation, and that Moon had started the fight by swinging at him with the hammer. RP 251, 267, 268. He gave a similar account to one of the responding officers, who relayed his statement to the jury. He'd told the officer that Moon had "got in his face," and that he had "pushed him back." RP 135. Then Moon swung at Mr. Keith with the hammer. Mr. Keith blocked and then grabbed the hammer, and either took it away or hit Moon with it. RP 135-136, 293.

Mr. Keith proposed instructions on self-defense. CP 25-26; RP 307-309. Over Mr. Keith's objection, the trial court refused to give Mr. Keith's proposed self-defense jury instructions. The court ruled that Mr. Keith's testimony did not support the instructions because he did not admit he intentionally struck Moon. RP 323-326. No self-defense instructions were given, and the jury was not told of the state's burden to disprove self-defense. CP 27-54.

The jury found Mr. Keith guilty of second degree assault with a deadly weapon other than a firearm, but not guilty of the burglary and harassment charges. RP 411-412.

[5] Mr. Keith did not have such an expert witness so the evidence was excluded. RP 49.

At sentencing, the court ordered Mr. Keith to undergo an evaluation for drug and alcohol abuse while on community custody, and to comply with all treatment recommendations. CP 67; RP 430. The trial court found Mr. Keith indigent. CP 74-75.

A Notice of Appeal was filed on February 11, 2016. CP 73.

ARGUMENT

I. THE TRIAL COURT DENIED MR. KEITH HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

A. The jury should have been instructed on self-defense since Mr. Keith met his burden of presenting "some evidence" of self-defense.

Mr. Keith's defense to the charge of assault was that he acted in self-defense after being attacked by Moon. The court should have instructed the jury on self-defense.

Both the United States Constitution and Wash. Const. art. I, §22, guarantee the criminal defendant a fair trial by an impartial jury. *State v. Latham*, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983).

A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). "Failure to give such instructions is prejudicial error." *State v. Riley*, 137 Wn.2d 904, 908 n. 1, 976 P.2d 624 (1999). Further, a criminal defendant is entitled to jury instructions that

accurately state the law, permit him to argue his case theory, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

"To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case." *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005)).

Where a defendant is denied the right to a fair trial, the proper remedy is reversal of the conviction and remand for a new trial. *State v. McDonald*, 96 Wn.App. 311, 979 P.2d 857 (1999), *affirmed* 143 Wn.2d 506, 22 P.3d 791 (2001).

When analyzing a trial court's refusal to permit jury instructions on self-defense, the standard of review depends on whether the trial court based its decision on a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). If the refusal is based on a matter of fact, appellate courts review for an abuse of discretion. *Walker*, 136 Wn.2d at 772. If the refusal is based on a matter of law, appellate courts review de novo. *Walker*, 136 Wn.2d at 772.

The trial court here refused to give jury instructions on self-defense based on an error of law. The trial judge did not believe that a defendant

could assert general denial and self-defense in the alternative, or that a defendant could assert accident and self-defense in the alternative. RP 324. The trial court held that instructions on self-defense were not appropriate because Mr. Keith was "claiming either it was inadvertent during a wrestling match, or it never happened at all." RP 325. Thus, the trial court's refusal to give the self-defense instructions was based on a matter of law and the review of the trial court's ruling is *de novo. Walker*, 136 Wn.2d at 772.

The use of force is lawful when used by a person about to be injured. RCW 9A.16.020(3). A person's right to use force is dependent upon what a reasonably cautious and prudent person in similar circumstances would have done and whether he reasonably believed he was in danger of bodily harm; actual danger need not be present. *State v. Theroff*, 95 Wn.2d 385, 390, 622 P.2d 1240 (1980).

> A criminal defendant is entitled to an instruction on his or her theory of the case if the evidence supports the instruction. Generally, a defendant is entitled to an instruction on self-defense if there is some evidence demonstrating self-defense. The sufficiency of the evidence of self-defense is evaluated by determining what a reasonable person would do standing in the shoes of the defendant. The refusal to give instructions on a party's theory of the case when there is supporting evidence is reversible error when it prejudices a party.

State v. Werner, 170 Wn.2d 333, 336–37, 241 P.3d 410 (2010) (citations omitted).

A trial court may refuse to give a self-defense instruction only where no credible evidence supports the claim. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). When deciding this issue, the trial court reviews the entire record in the light most favorable to the defendant. *State v. Callahan*, 87 Wn.App. 925, 933, 943 P.2d 676 (1997).

Imminent danger need not actually exist as long as a reasonable person in the defendant's situation could have believed it existed. *Walker*, 136 Wn.2d at 772. Imminence does not require an actual physical assault; a threat can support a finding of imminence where the defendant actually and reasonably believed the threat would be carried out. *State v. Janes*, 121 Wn.2d 220, 241, 850 P.2d 495 (1993). If "some" evidence supports self-defense, then the court must instruct the jury on the defense. *Walker*, 136 Wn.2d at 772–73; *Werner*, 170 Wn.2d at 336–37.

1. An accused person may assert defenses of accident and self-defense simultaneously.

The defenses of accident and self-defense are not mutually exclusive as long as there is evidence of both. *Callahan*, 87 Wn.App. at 931–33. Surveying Washington law on the matter, the court in *Callahan* cited as an example *State v. Fondren*, 41 Wn.App. 17, 701 P.2d 810

(1985). In *Fondren*, the defendant testified that he pulled out a firearm because he feared for his own safety and the safety of others, believing that displaying the firearm would stop the altercation. The defendant stated that when he and the victim scuffled, the gun accidentally discharged. The court held that the defendant's intentional use of force before the shooting provided sufficient grounds for a self-defense instruction. *Fondren*, 41 Wn.App. at 24; *Callahan*, 87 Wn.App. at 931.

The trial court erred in refusing to instruct the jury on self-defense on the basis that accident and self-defense were mutually exclusive defenses. *Callahan*, 87 Wn.App. at 931.

2. Mr. Keith presented "some" evidence of self-defense.

In order to raise the issue of self-defense, "there need only be some evidence admitted in the case from whatever source" which tends to prove that the defendant acted in self-defense. *State v. Summers*, 120 Wn.2d 801, 819, 846 P.2d 490 (1993) (*quoting State v. McCullum*, 98 Wn.2d 484, 500, 656 P.2d 1064 (1983)). Further, a criminal defendant is not required to testify during his own criminal trial. U.S. Const. amend. V; Wash. Const. art. I, § 9; RCW 10.52.040.

This case is like *Fondren*. Mr. Keith testified that he struggled with Moon for control of the hammer after Moon had hit him with it, and that Moon was accidentally struck in the face with the hammer during the

struggle. RP 249-251. While Mr. Keith testified he did not intentionally use the hammer as a weapon, as in *Fondren* the hammer was "in play" as a weapon and during a struggle for control of the hammer the hammer injured Moon.

As stated above, a defendant needs only to introduce "some" evidence from any source demonstrating that the force used was used in self-defense. As in *Fondren*, the evidence presented by Mr. Keith regarding the force used by Mr. Keith was sufficient for a self-defense instruction in this case.

In addition, Mr. Keith was "entitled to the benefit of all of the evidence, whether or not [he] introduced it." CP 28. The trial court was obligated to consider all the evidence in assessing his self-defense claim. *State v. Fernandez-Medina*, 141 Wn.2d 448, 460, 6 P.3d 1150 (2000). This includes evidence inconsistent with his own testimony. *Id.* The trial court should have relied on more than just Mr. Keith's own testimony. For example, the court should have considered Mr. Keith's statements to the police, which were admitted without limitation. RP 135-136, 293. These statements provided at least "some" evidence of self-defense.

The trial court erred when it refused to instruct on self-defense. This denied Mr. Keith his constitutional right to present a defense.

3. Mr. Keith was prejudiced by the trial court's refusal to give self-defense instructions.

Where "the outcome turns on which version of events the jury believed, the failure to give a self-defense instruction prejudice[s the defendant]" requiring reversal of the conviction. *Werner*, 170 Wn.2d at 338.

Here, the outcome of the trial on the assault charge absolutely turned on which version of events the jury believed. Mr. Keith testified that Moon attacked him with the hammer and he was acting solely in self-defense. Moon and Brooks testified that Mr. Keith was the aggressor who initiated the attack on Moon. The jury obviously did not believe all of the state's evidence and argument since it found Mr. Keith not guilty of the harassment and burglary charges. The lack of instructions on self-defense greatly prejudiced Mr. Keith.

B. Mr. Keith was denied his constitutional right to present a defense by the trial court's erroneous exclusion of Moon's prior assault conviction, of which Mr. Keith was aware at the time of the altercation.

Mr. Keith was charged with assault and asserted the defense of self-defense. RP 42. He should have been permitted to tell the jury that he knew of Moon's prior assault conviction at the time of the altercation.

The right to present testimony in one's defense is guaranteed by both the United States and the Washington constitutions.[6] *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). Here, Mr. Keith had a constitutional right to present evidence of Moon's assault conviction as evidence of his state of mind at the time he acted in self-defense.

The threshold to admit relevant evidence is very low; even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Any state interest in excluding prejudicial evidence "must be balanced against the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld." *Darden*, 145 Wn.2d at 622, 41 P.3d 1189. The Washington Supreme Court has noted that for evidence of high probative value, "it appears [that] no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." *Hudlow*, 99 Wn.2d at 16, 659 P.2d 514. Moreover, the considerations of Evidence Rule 403, which requires balancing the probative value of

[6] The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor." Similarly, article I, §22 of the Washington Constitution guarantees that "[i]n criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face, [and] to have compulsory process to compel the attendance of witnesses in his own behalf."

evidence against the danger of prejudice, cannot be used to exclude "crucial evidence relevant to the central contention of a valid defense." *State v. Young*, 48 Wn.App. 406, 413, 739 P.2d 1170 (1987).

Here, Mr. Keith sought to introduce evidence that Moon had previously been convicted of assault, and that Mr. Keith was aware of Moon's assault conviction at the time he acted in self-defense. Evidence of a victim's prior acts of violence, which are known by the defendant, is relevant to a claim of self-defense "'because such testimony tends to show the state of mind of the defendant ... and to indicate whether he, at that time, had reason to fear bodily harm.'" *State v. Cloud*, 7 Wn.App. 211, 218, 498 P.2d 907 (1972) (*quoting State v. Adamo*, 120 Wn. 268, 269, 207 P. 7 (1922)). Thus, such evidence is admissible to show the defendant's reason for apprehension and the basis for acting in self-defense. *See State v. Woodard*, 26 Wn.App. 735, 737, 617 P.2d 1039 (1980); *Cloud*, 7 Wn.App. at 217, 498 P.2d 907.

Where self-defense is at issue, "the defendant's actions are to be judged against [his] own subjective impressions and not those which a detached jury might determine to be objectively reasonable." *State v. Wanrow*, 88 Wn.2d 221, 240, 559 P.2d 548 (1977). The jury must take into account "*all* the facts and circumstances known to the defendant, *including those known substantially before the [incident]*." *Wanrow*, 88

Wn.2d at 234, 559 P.2d 548 (emphasis added); *see also State v. Kelly*, 102 Wn.2d 188, 196–97, 685 P.2d 564 (1984); *State v. Allery*, 101 Wn.2d 591, 594–95, 682 P.2d 312 (1984). Because the "'vital question is the reasonableness of the defendant's apprehension of danger,'" the jury must stand "'as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act.'" *Wanrow*, 88 Wn.2d at 235 (quoting *State v. Ellis*, 30 Wn. 369, 373, 70 P. 963 (1902)). The jury should consider, not only the immediate circumstances surrounding the altercation, but also those occurring substantially beforehand. *State v. Crigler*, 23 Wn.App. 716, 719, 598 P.2d 739 (1979); *State v. Bailey*, 22 Wn.App. 646, 649, 591 P.2d 1212 (1979).

Mr. Keith's state and federal constitutional right to present a defense entitled him to introduce evidence of all the facts he was aware of at the time he acted in self-defense. The "vital question" presented to the jury in this case was the reasonableness of Mr. Keith's apprehension of the danger presented by Moon. The jury was required to judge the reasonableness of Mr. Keith's apprehension of danger, based on all the facts and circumstances known to Mr. Keith. That knowledge included knowledge of Moon's assault conviction that the trial court excluded.

Although evidentiary rulings are ordinarily reviewed for an abuse of discretion,[7] a court necessarily abuses its discretion by violating an accused person's constitutional rights. *See, e.g., State v. Iniguez*, 167 Wash.2d 273, 280-81, 217 P.3d 768 (2009).[8]

Thus, courts review *de novo* an argument that the trial court violated an accused person's right to present a defense. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). This means the reviewing court must apply a *de novo* standard to questions of admissibility, even though evidentiary rulings are ordinarily reviewed for an abuse of discretion. *Id.*

The trial judge found that Moon's prior assault conviction was irrelevant unless Mr. Keith testified that he assaulted Moon, and that he did so because of Moon's prior assaultive behavior. RP 46. This was error.

Whether an individual acted in self defense is typically a question for the trier of fact. *McBride v. Walla Walla County*, 95 Wn.App. 33, 975 P.2d 1029, *as amended* 990 P.2d 967 (Wash. Ct. App. 1999), *review denied* 138 Wn.2d 1015, 989 P.2d 1137 (1999). To establish self-defense, a defendant must produce evidence showing that he or she had good faith

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[7] A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or taking an erroneous view of the law. *State v. Hudson*, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009).

[8] *See also United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992).

belief in the necessity of force and that such belief was objectively reasonable. *State v. Dyson*, 90 Wn.App. 433, 952 P.2d 1097 (1997). As stated above, the jury must take into account "*all* the facts and circumstances known to the defendant, *including those known substantially before the [incident]*." *Wanrow*, 88 Wn.2d at 234 (emphasis added).

A defendant need not show that an act of self-defense was based entirely on the defendant's knowledge of the victim's prior assaultive behavior. Rather, evidence of the victim's prior assaultive behavior is relevant and admissible as part of the defendant's knowledge at the time he acted in self-defense. The jury must consider such evidence in determining if the defendant acted in self-defense.

The trial court erred by excluding evidence of Moon's prior conviction for assault. The relevance of the evidence was established by the legal standard requiring jurors to consider the reasonableness of Mr. Keith's actions based on *all* evidence known to Mr. Keith when he acted in self-defense. *Wanrow*, 88 Wn.2d at 234.

The Sixth Amendment is violated whenever a defendant is effectively barred from presenting a defense due to the exclusion of evidence. *Jones*, 168 Wn.2d at 720-21. In *Jones*, the court reversed a rape conviction because the defendant was precluded from testifying as to

his version of the incident. *Id.* The court held that evidence that constitutes a defendant's entire defense is so highly probative that no state interest is compelling enough to preclude its introduction. *Id.*

Similarly, here, Mr. Keith was effectively barred from presenting his self-defense claim because the trial court excluded evidence of Moon's conviction for assault, where Mr. Keith was aware of the conviction. This is particularly true given the version of events contained in Mr. Keith's statement to police. RP 135-136, 293.

Where self-defense is at issue, "the defendant's actions are to be judged against [his] own subjective impressions and not those which a detached jury might determine to be objectively reasonable." *Wanrow*, 88 Wn.2d 221, 240, 559 P.2d 548. The jury must take into account "*all* the facts and circumstances known to the defendant, *including those known substantially before the [incident]*." *Wanrow*, 88 Wn.2d at 234, 559 P.2d 548 (emphasis added); *see also Kelly*, 102 Wn.2d at 196–97; *Allery*, 101 Wn.2d at 594–95. Because the "'vital question is the reasonableness of the defendant's apprehension of danger,'" the jury must stand "'as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act.'" *Wanrow*, 88 Wn.2d at 235, 559 P.2d 548 (*quoting Ellis*, 30 Wash. at 373.

Exclusion of evidence that Mr. Keith was aware that Moon had

previously been convicted of assault weakened Mr. Keith's defense. Not only was the jury supposed to make its determination based on *all* facts known to Mr. Keith, but the jury would have weighed the reasonableness of Mr. Keith's actions differently if it was aware that Mr. Miles had previously been convicted of assaulting another person.

Because Mr. Keith was not permitted to testify or otherwise introduce evidence regarding Moon's assault conviction, the jury was unable to consider all of the facts and circumstances known to Mr. Keith.[9] Mr. Keith was precluded from presenting highly probative evidence relevant to whether he reasonably feared Moon and, thus, whether he was justified in using force against him.

Testimony regarding Moon's assault conviction was relevant to show that Mr. Keith reasonably feared Moon and acted reasonably when Moon attacked him with a hammer.[10] Because Mr. Keith was prevented from presenting evidence essential to proving his claim of self-defense, his Sixth Amendment right to present testimony in his defense was violated. *Hudlow*, 99 Wn.2d at 14.

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[9] In addition, because of the court's refusal to instruct on self-defense, the jury was not even allowed to evaluate his self-defense claim.

[10] Alternatively, if jurors believed the officer's recitation of Mr. Keith's statement, knowledge of the assault would have helped them evaluate his decision to push Moon when he got in Mr. Keith's face. RP 135-136, 293.

II. THERE WAS NO BASIS TO REQUIRE MR. KEITH TO UNDERGO A DRUG AND ALCOHOL EVALUATION AS A CONDITION OF COMMUNITY CUSTODY, SINCE THE TRIAL COURT THOUGHT THERE WAS NO "PARTICULAR EVIDENCE" THAT THE CRIMES WERE RELATED TO ALCOHOL OR DRUG ABUSE.

No evidence suggested that alcohol or drugs contributed to Mr. Keith's offense. The court "[didn't] think there was any particular evidence" of alcohol or drug involvement. RP 430. Despite this, the court ordered Mr. Keith to undergo an alcohol and drug evaluation, and to follow treatment recommendations. CP 67. This was error.

RCW 9.94A.505(9) provides, in pertinent part, "As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter." *See also* RCW 9.94A.703(3). An offender may challenge an erroneously imposed sentence for the first time on appeal. *State v. Coombes*, 191 Wn. App. 241, 249, 361 P.3d 270, 274 (2015), *review denied,* 185 Wn.2d 1020, 369 P.3d 500 (2016). Sentencing conditions are reviewed for an abuse of discretion. *State v. Munoz-Rivera*, 190 Wn. App. 870, 890, 361 P.3d 182 (2015). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *Id.*

In requiring Mr. Keith to undergo drug and alcohol counseling, the trial court stated that it was imposing the condition even though it "[didn't] think there was any particular evidence of it." RP 430.

Alcohol or drug counseling reasonably relates to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol or drugs "contributed to the offense." *Id.*, at 892-893.

The trial court explicitly found that it "[didn't] think there was any particular evidence" that Mr. Keith used drugs or alcohol during the commission of the assault, yet it still imposed the condition that Mr. Keith undergo drug and alcohol evaluation and comply with all treatment recommendations. CP 67.

Drug and/or alcohol consumption bore no relation to Mr. Keith's commission of the assault, or to Mr. Keith's risk of reoffending or threatening the safety of the community. The trial court abused its discretion in imposing the drug and alcohol evaluation condition, while explicitly finding that there was no evidence to support it. *Id.* The condition must be stricken from the Judgment and Sentence. *Id.*

III. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should

it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016) *review denied,* 185 Wn.2d 1034 (2016).[11]

Appellate costs are "indisputably" discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina,* 182 Wn.2d 827, 344 P.3d 680 (2015). Furthermore, "[t]he future availability of a remission hearing in a trial court cannot displace [the Court of Appeals'] obligation to exercise discretion when properly requested to do so." *Sinclair*, 192 Wn. App. at 388.

The trial court found Mr. Keith indigent. CP 74-75. There is no reason to believe that status will change. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

Mr. Keith's right to present a defense was violated by the trial court's erroneous exclusion of evidence (that Moon had previously been convicted of assault) and by the court's refusal to instruct on self-defense.

[11] Division III does not appear to have addressed the *Sinclair* approach to appellate costs.

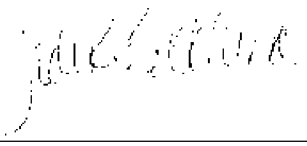
The refusal to instruct (and the exclusion of the evidence) prevented Mr. Keith from asserting his defense. This court should vacate Mr. Keith's conviction and remand his case for a new trial at which evidence of Moon's assault conviction is admitted and where the jury is instructed on self-defense.

Additionally, the trial court abused its discretion in imposing the community custody condition requiring Mr. Keith to undergo a drug and alcohol evaluation and comply with any treatment recommendations, where the trial court also found that there was no evidence that the assault was connected to Mr. Keith's consumption of drugs or alcohol. This court should vacate that provision of Mr. Keith's sentence.

Finally, should the state substantially prevail on this appeal, this court should decline to impose appellate costs on Mr. Keith.

Respectfully submitted on August 31, 2016,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
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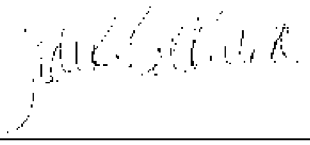
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 31, 2016.



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August 31, 2016 - 10:51 AM

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